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resulted in spite of ordinary care on the part of defendant. Under defendant's second instruction, the jury were told that although they believe from the evidence that the stepladder was furnished to plaintiff by defendant with the knowledge on the part of defendant that it was defective, and by reason thereof plaintiff sustained the injury complained of, yet they must find for defendant if they believe from the evidence that the defects were open or obvious or were such that were known or by the exercise of reasonable care, could have been known by plaintiff. Judgment for plaintiff, and defendant brings error. Affirmed.

*A. B. Seldner*, for plaintiff in error.

*J. Edward Cole*, for defendant in error.

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BUTLER BROS.-HOFF CO., Inc., *v.* VIRGINIAN RY. C., Inc.

Jan 18, 1912.

[73 S. E. 441.]

**1. Contracts (§ 170\*)—Construction by Parties.**—In construing a contract, the court may look to the construction which the parties themselves have placed upon it in its execution.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 753; Dec. Dig. § 170.\* 3 Va.-W. Va. Enc. Dig. 401.]

**2. Contracts (§ 170\*)—Construction—Construction of Contract by Parties—Acquiescence.**—A railroad construction contract provided compensation ranging from 27 cents per cubic yard for "earth," to \$3 per cubic yard for "excavation in water," which the contract defined as foundation pits under water and the deepening of channels in running water. The railroad's engineer, on whose estimates and certificates of the work done the contractor was paid, at no time during the work classified any of it as excavation in water, nor the contractor ever claimed that any part of this work should be so classified, but during the work he concluded that it was excavation in water and intended upon completion to assert a claim for compensation on that classification, although no notice of this determination was given to the railway. Held, in the contractors' action for such further compensation, that the meaning of the term as used in the contract was doubtful, and the court would resort to the construction given to the contract by the parties, but that the contractor's undisclosed conclusion would not be considered, and that, as the contractor by his acquiescence had placed the same construction on the contract as the railway's engineer, that construction would prevail, so that there could be no recovery.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 753; Dec. Dig. § 170.\* 3 Va.-W. Va. Enc. Dig. 401.]

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\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

**3. Appeal and Error (§ 1099\*)—Review—Findings—Conflicting Evidence.**—When the evidence in a contractor's action against a railroad for extra labor and materials rendered necessary in repairing a trestle, which fell because of defective plans furnished by the railroad, was conflicting and the contractor had the burden of proof, the Supreme Court of Appeals could not say that the trial court's refusal to allow therefor was error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3970-3978; Dec. Dig. § 1099.\* 10 Va.-W. Va. Enc. Dig. 461.]

**4. Interest (§ 50\*)—Computation and Time—Suspension by Tender.**—Where plaintiff obtained a decree for money with interest from the date when it was due, payable on the execution of a release from him, and defendant was willing to pay to the plaintiff the amount decreed on plaintiff's execution of the release, and moved to be released from payment of interest thereafter, without prejudice to his right to assign cross-errors on appeal, but did not actually tender the amount of the decree either to the plaintiff or to the court, and the plaintiff did not waive an actual tender, the motion was properly overruled, since upon payment into court the court could have protected defendant by ordering the execution of the release.

[Ed. Note.—For other cases, see Interest, Cent. Dig. § 114; Dec. Dig. § 50.\* 13 Va.-W. Va. Enc. Dig. 191, 201.]

**5. Damages (§ 68\*)—Interest—Delay in Issuing Certificate.**—Where a contract for railroad construction provided that, upon the completion and acceptance of the work, the railroad's engineer should issue a certificate of acceptance, upon which the entire balance due the contractor should be due within 20 days, and the engineer was notified of the completion and requested to issue the certificate, but delayed until nearly two months after the completion the contractor, to whom a large sum was due, was entitled to interest thereon from the completion of the contract.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 141-143; Dec. Dig. § 68.\* 7 Va.-W. Va. Enc. Dig. 824, 827.]

Appeal from Circuit Court of Campbell County.

Bill by the Butler Bros.-Hoff Company, Incorporated, against the Virginian Railway Company, Incorporated. From the decree, complainant appeals. Affirmed.

*Braxton & Eggleston and J. T. Coleman*, for appellant.

*H. T. Hall, E. W. Knight, and A. A. Phlegar*, for appellee.

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\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.